

CRIMINAL YEAR SEMINAR

April 14, 2017 - Tucson, Arizona

April 21, 2017 - Phoenix, Arizona

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2016 CRIMINAL PROCEDURE UPDATE

Presented By:

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&

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Criminal Rules Reporter Presentation

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Notes to Consider While Following the Presentation

- ❖ This presentation follows the program.
- ❖ Some of the cases presented are mentioned more than once.
- ❖ Each case presented deals with the pertinent issue at hand as described in the program. Therefore, each case may have multiple issues which are not discussed, or discussed in a later slide.
- ❖ Because the presentation addresses the change in law regarding the Arizona Rules of Criminal Procedure, the relevant issues to those changes are the central issues discussed in this presentation.

State v. Peraza, 239 Ariz. 140, 366 P.3d 1030 (Ct. App. 2016).

Facts: Luis Peraza was stopped when Tucson Police Department observed Peraza use a private parking lot to avoid a traffic signal. As the officer approached Peraza, the officer noticed signs of impairment along with an open container of alcohol. Peraza was arrested after signaling signs of impairment during FST's and admitting to consuming alcohol.

Rule: Rule 6.1(a), Ariz. R. Crim. P. - Right to counsel

Issue: To what extent must an officer give a defendant the opportunity to reach an attorney?

Holding/Reasoning: "In this case, however, Peraza's right to counsel was honored. The officer notified Peraza of his right to counsel, [permitted] him to call an attorney, and gave Peraza adequate time to contact one before continuing his investigation. The officer could not know when or if an attorney would call back." Conviction affirmed.

State v. Ramos, 239 Ariz. 501, 372 P.3d 1025 (Ct. App. 2016).

Facts: After a jury trial, Derek Ramos was convicted of attempted possession of a dangerous drug by fraud, forgery, and taking the identity of another. Ramos appealed and claimed that, among other issues, the trial courts' denial of his request for a continuance violated his right to representation of counsel because he had retained new counsel and argued that his new attorney did not have sufficient time to prepare for trial.

Rule: Rule 8.5(b), Ariz. R. Crim. P. – Continuances – Grounds for motion

Issue: Does a denial of a motion to continue based on a defendant's retention of new counsel necessarily violate the defendant's right to representation by counsel?

Holding/Reasoning: No. the Arizona Court of Appeals affirmed Ramos's conviction holding that "[Ramos's attorney] participated significantly during a pretrial hearing; made objections and conducted cross-examination during the trial; [participated] at the prior hearing; and argued on Ramos's behalf during sentencing." Further the Arizona Court of Appeals held that "[a]lthough denying counsel adequate time to prepare a case for trial may deny the defendant a substantial right, time [constraints] by themselves do not create [prejudice]."

The trial court may grant a motion to continue only when extraordinary circumstances exist and the delay is indispensable to the interest of justice; to show abuse of discretion, the party must show prejudice.

State v. Ingram, 239 Ariz. 228, 368 P. 3d 936 (Ct. App. 2016).

Facts: Ingram was arrested on charges of prohibited possession when a gun was found – near and with other belongings of his – during a search of the premises where he was living. The week before trial, the case was reassigned to the trial judge by an "immediately distributed" order dated January 29, 2015. Ingram filed a notice of change of judge as a matter of right pursuant to Rule 10.2 on February 2, 2015, the day before trial. The court denied the notice as untimely.

Rule: Rule 10.2, Ariz. R. Crim. P. – Change of Judge Upon Request

Issue: Does a ruling on a Rule 10.2 notice of change of judge have to be challenged by way of special action, or can be reviewed on direct appeal from the final judgment of conviction?

Holding/Reasoning: Ingram contends that because the motion for change of judge was filed the day before trial, a special action was impossible. The court held that while it may be difficult it is not impossible. "In sum, we conclude that a [challenge] to the denial of a notice of peremptory change of judge filed pursuant to Rule 10.2 must be brought by special action." "A [defendant] cannot challenge the trial court's denial of his request for a peremptory change of judge on direct appeal." Ingram's conviction and sentence is affirmed.

Woodington v. Browning (State), 240 Ariz. 288, 378 P.3d 731 (Ct. App. 2016).

Facts: Woodington was arraigned on a charge of second-degree murder. Woodington moved to dismiss or, in the alternative, to remand the matter to the grand jury. Judge Christopher Browning, determined there were "enough areas of concern in the presentation to the grand jury" to merit a new presentation and remanded the matter for a redetermination of probable cause. The grand jury returned a new indictment under the same cause number and on March 9, 2016, Woodington was again arraigned.

Rule: Rule 10.2(c), Ariz. R. Crim. P. – Change of judge on request – Time for filing

Issue: Is a defendant entitled to a change of judge once his case has been remanded back to the trial court?

Holding/Reasoning: Woodington is not entitled to a second peremptory challenge, "once the initial proceeding was dismissed, 'nothing remained of that action' and, '[w]hen the new case began, Rule 10.2 provided each party a peremptory right to change the judge within the time permitted by the rule.'" Because Woodington's case was never dismissed, he was not entitled to a second peremptory challenge. The court held that on remand to the grand jury, a case is simply continued after the new findings of probable cause.

Higuera v. Lee (State), 241 Ariz. 76, 383 P.3d 1150 (Ct. App. 2016).

Facts: Higuera was charged with theft. By special action, Higuera challenges the respondent judge's determination that she had waived her right to a peremptory change of judge and had failed to properly file the notice for such a change.

Rule: Rule 10.4(a), Ariz. R. Crim. P. – Waiver and renewal – Waiver

Issue: Should a "pretrial hearing," for purposes of Rule 10, be interpreted to mean a hearing that comprises only of hearings involving a contested matter?

Holding/Reasoning: In any criminal case, each side is entitled, as a matter of right, to a change of judge. To exercise this right, the party must timely file a pleading entitled 'Notice of Change of Judge' signed by counsel, if any, stating the name of the judge to be exchanged and including an avowal that the request is 'made in good faith' and not for various improper purposes.

State v. Hegyi (Ramussen), 240 Ariz. 251, 378 P.3d 428 (Ct. App. 2016). [Rev. Granted]

Facts: Ramussen was charged with armed robbery and first-degree murder. Ramussen hired Moran, Ph.D., to evaluate his mental health. Following the evaluation, the State had Ramussen evaluated by a court appointed psychologist, who determined Ramussen met the guilty-except-insane defense criteria. Upon the State's request for disclosure, Ramussen provided copies of the requested documents with some of his statements redacted from the documents. The State objected to this and Ramussen successfully argued that he was only required to produce copies of the doctors' records with his statements redacted. A special action followed.

Rules: Rule 11.4, Ariz. R. Crim. P. - Disclosure of Mental Health Evidence

Issue: Is a defendant who raises a guilty-except-insane defense required to disclose statements he made to a mental-health evaluator?

Holding/Reasoning: Yes. The Arizona Court of Appeals held that the defense's argument, that our Supreme Court had intended to allow a defendant's statement to a non-court-appointed mental-health expert to be redacted from the experts report in *Austin v. Alfred*, 163 Ariz. 397, 788 P.2d 130 (App. 1990), was not a valid argument. The court held that if the Supreme Court had intended for this, they would have known how to include the requirement seeing as the redaction provision was inserted in R. 11.4(a), Ariz. R. Crim. P. "Once the insanity defense is raised, A.R.S. § 13-3993 (2010) allows the defendant to be examined, and removes any physician-patient privilege as to any communication made "as it relates to the defendant's mental state at the time of the alleged crime."

State v. Neese, 239 Ariz. 84, 366 P.3d 561 (Ct. App. 2016).

Facts: A string of burglaries was investigated by Scottsdale police from 1999 -2004. During the investigation the police were able to collect multiple DNA samples and determine that the burglaries were all connected. On March, 2015, an indictment was filed charging "John Doe, I" with eight counts of burglary and four counts of theft. In May, 2011, a DNA sample obtained from Neese was collected that matched the DNA profile collected and named as "John Doe I." After the match, a warrant was issued based on the Amended Indictment that identified Neese. Neese subsequently moved to dismiss the twelve counts relating to offenses occurring before May, 2004, arguing that the applicable seven-year statute of limitations had expired before the State amended the Indictment naming him as the defendant.

Rules: Rule 13, Ariz. R. Crim. P. - Indictment and Information, A.R.S. § 13-107

Issue: Do DNA samples from a defendant that match a DNA profile gathered by investigators satisfy the reasonable certainty requirement?

Holding/Reasoning: Yes, A.R.S. § 13-107(C) states that filing of an indictment commences prosecution. According to Ariz. R. Crim. P. 13.2, "An indictment charging an unknown defendant must contain 'any name or description by which he can be identified with reasonable certainty.'" The court held that "Arizona law does not require an indictment to name a defendant; rather, if the person's name is unknown, the indictment need only provide a description that identifies the defendant 'with reasonable certainty.'" The court also held that its holding is limited to the facts and procedural history of this particular case, and acknowledges that there may be instances where a "John Doe" indictment of inferior identification traits may not sufficiently describe a defendant with reasonable certainty.

***State v. O'Laughlin*, 239 Ariz. 398, 372 P.3d 342 (Ct. App. 2016).**

Facts: O'Laughlin was convicted of burglary and possession of burglary tools under indictment charging: "to wit: flashlight, knife, gloves." O'Laughlin appealed contending that the trial court erred in including "and/or" to the list of burglary tools on the verdict form and in the alternative, that the indictment was duplicitous.

Rule: Rule 13.3(a), Ariz. R. Crim. P. – Joinder – Offenses

Issue: Is the statute governing possession of burglary tools a single-offense statute that renders an indictment duplicitous? – Was the verdict form for that used "and/or" in a list of burglary tools properly reflected in the indictment?

Holding/Reasoning: The court held that this was one crime that can be committed several ways, so it did not matter whether he possessed one, two, or three burglary tools. Further, the court defines a duplicitous indictment as "one that on its face alleges multiple distinct and separate offenses in one count." The court recognizes the implications of duplicitous indictments stating that they may prejudice a defendant "by not providing adequate notice of the charge to be defended, presenting the risk of a non-unanimous jury verdict, and making impossible the precision needed to assert double jeopardy in a later prosecution." However, the court also held that an indictment is not duplicitous if the court alleges only one offense. This is true even in the instance that the offense may be committed in different ways. In this case, because the statute in question is directed at preventing burglary using one or many tools, the allowable unit of prosecution is unaffected by the number of tools.

Because in legal texts, the general rule interpreting asyndetic sentences is to imply "and" as the final coordinating conjunction *and*, it has been noted that this general rhetorical rule does not apply to non-persuasive legal texts such as statutes. The trial court did not abuse its discretion by denying the implied request to add the word "and."

***State v. Goudeau*, 239 Ariz. 421, 372 P.3d 945 (2016).**

Facts: Goudeau was charged with seventy-four felonies, including nine first-degree murders for which the State sought the death penalty. Because of the extent of the crimes the state alleged upon Goudeau, the court has divided the case into thirteen separate chapters describing the crimes alleged upon Goudeau.

Chapter 1: Goudeau, armed with a silver handgun, accosted three minors and told them that he had just robbed a bank and needed directions, and that he was waiting for his "buddy" to give him a ride. He held the minors at gunpoint. Also, he sexually assaulted two of the female victims and had them wipe evidence off of their persons before leaving the scene.

Chapter 2: A female victim was found with a gunshot wound to the head left dead in the parking lot of her apartment.

Chapter 3: Evidence was presented that connected his activity with sexual assault, sexual abuse against two sisters. The facts of this case was consistent with Goudeau's behavior.

Chapter 4: It is noted that after robbing a take-out window, Goudeau approached two victims, one being twelve-years-old, and told them that his "buddy" had left him behind. He then sexually assaulted the twelve-year-old and her mother. Before leaving the scene, Goudeau used the victims clothing to wipe down areas in the car that he had touched.

***State v. Goudeau*, 239 Ariz. 421, 372 P.3d 945 (2016). – Cont.**

Facts Continued:

Chapter 5: Goudeau pointed a silver handgun at the female victims head and demanded money. Afterwards, he found another female victim and pointed a silver handgun at her and demanded a ride. Goudeau told her that he had just robbed a store and that his "buddy" had left him. Later he sexually assaulted the victim and ordered her to wipe off the areas he touched her. He then took her purse and cash and left.

Chapter 6: Goudeau entered a restaurant and brandished a silver handgun demanding money. After robbing the store, he fled to the adjacent restaurant and brandished a silver gun and demanded money from the register. Following the two robberies, Goudeau pointed his handgun at two other women and attempted to grab their purse. He then ran off firing his gun in the air.

Chapter 7: A gentleman stepped outside of his house after hearing gunshots. When he stepped outside he saw Goudeau holding a silver gun pointing it at a body on the ground. Godeau then pointed the gun at the witness who quickly retreated inside his home.

Chapter 8: Two bodies were found dead side-by-side on the floor of a food-truck with gunshot wounds to the head. The purse of one of the victims was missing.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945 (2016). – *Cont.***Facts Continued:**

Chapter 9: A couple left work together and the male victim was later found with a gunshot wound to the head in an alley. The female victim was found partially unclothed with a gunshot wound to the head. Ballistics proved that both were shot inside of a car from the rear passenger seat, which is consistent with previous cases involving Goudeau.

Chapter 10: A victim was located by a business owner days after death by an overwhelming stench, and was identified to have a gunshot wound to the head.

Chapter 11: An eight-year-old child came home from school to discover his mother lying dead submerged in a bathtub, which was over flowing with blood and water. She had suffered gun shot wounds to the head and had displayed signs of sexual abuse.

Chapter 12: Goudeau pressed a silver handgun against the victims head while she was in her car. While in the car, Goudeau told the victim that he had just robbed a store and needed to meet his friend. Goudeau then proceeded to attempt to assault the female victim in which he did not succeed. The female victim took the keys from the vehicle and successfully fled to safety.

Chapter 13: Goudeau ambushed a female victim at a carwash and pushed her into the rear of her car while she was on the phone with her boyfriend. The female victim was later found lying dead in the back seat with a gunshot wound to the head and had signs of sexual abuse.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945 (2016). – *Cont.*

Relevant Facts to the Rule: Before trial Goudeau moved to sever the seventy-four offenses charged in the indictment, seeking separate trials for either the thirteen incidents or, in the alternative, for the capital and noncapital charges. The trial court denied this motion stating that: "the evidence proffered for 'other acts' is for the purpose of providing identity, plan, preparation, and opportunity to commit each of the charged offenses." The trial court further found that the "other-act" evidence has a probative value that is not substantially outweighed by the danger of an unfair prejudice and not cumulative.

Rule: Rule 13.4(b), Ariz. R. Crim. P. – Severance – As of right.

Issue: Is a defendant entitled to severance as a matter of right for offenses that are joined because they are of the same or similar character if the evidence of one would be admissible at a trial of the others if the offenses were tried separately?

Holding/Reasoning: No. The court held that because identity was the only disputed issue in this case, and because the State could properly introduce other-act evidence to prove that Goudeau committed the crimes the trial court's denial was proper. Further, the court articulated that the similarity of the actions and attributes of the perpetrator in the different chapters tended to show the offenses were of a similar or even the same character for purposes of joinder under Rule 13.3(a)(1). Further, the court held that the evidence in question would have been admissible under Rule 404(b) if the offenses were tried separately. Because of this, the defendant is not entitled to a severance as a matter of right.

State v. Gutierrez, 240 Ariz. 460, 381 P.3d 254 (Ct. App. 2016).

Facts: Gutierrez was stopped by police for suspicious driving paired with crossing over the fog line on the I-17. After stopping the defendant, the officer called in a K-9 unit. The K-9 made positive identifications that warranted probable cause for a search. During the search, firearms and large quantities of drugs were found. The State charged Gutierrez and his passenger with possession of drugs. Gutierrez was found guilty and sentenced to a term 14 years imprisonment.

Rule: Rule 13.4(c), Ariz. R. Crim. P. – Timeliness and waiver.

Issue: Is the court bound to grant a motion for severance of a joint trial in the instance where the defenses from the defendants are mutually exclusive?

Holding/Reasoning: No. While the court held that because the defendant did not renew the denied motion for severance during the trial, the issue of severance was untimely and thus waived. Among the stated reasons, the court also held that joint trials are favored in the interest of judicial economy and to establish an abuse of discretion, a defendant must show that at the time he moved to sever, he had proved his defense would be prejudiced absent severance. Because the defenses were mutually exclusive, there was no prejudice found by the Arizona Court of Appeals.

***Allen v. Sanders (State)*, 240 Ariz. 569, 382 P.3d 784 (2016).**

Facts: Defendant and codefendant were indicted for first-degree murder of their child and for child abuse offenses. Following hearing under *Chronis v. Steinle*, 220 Ariz. 559, 208 P.3d 210, the superior court ruled that convictions on child abuse charges would constitute convictions for "serious offenses," within meaning of statutory aggravating circumstance, and that, because grand jury had found probable cause to support child abuse charges, there was probable cause to support "serious offenses" aggravator.

Rule: Rule 13.5(c), Ariz. R. Crim. P. – Amendment of charges; defects in the charging document – Amendments To Conform to Capital Sentencing Allegations; Challenges to Capital Sentencing Allegations

Issue: If a defendant challenges the legal sufficiency of an (F)(2) aggravating circumstance that depends on a concurrently charged offense for which a grand jury has found probable cause, must the trial court in a *Chronis* hearing independently determine probable cause?

Holding/Reasoning: "Allowing a trial court to independently determine whether probable cause exists to support a concurrently charged offense is at odds with our well-settled case law that prohibits trial judges from weighing the nature and sufficiency of the evidence presented to the grand jury." "[W]e hold that when a defendant challenges the legal sufficiency of an alleged (F)(2) aggravating circumstance that turns on a concurrently charged offense, the trial court must independently determine if the offense qualifies as a serious offense, but the court should accept the grand jury's determination that probable cause exists for that offense." The court also notes that its holdings are limited to the circumstances of the (F)(2) aggravator and is not intended to narrow the scope of a defendant's rights under *Chronis* and *Sanchez*.

***Mesa v. Granville*, 241 Ariz. 754, 386 P.3d 387 (2016).**

Facts: Mesa was indicted on charges of first-degree murder and other charges in May of 2014. Following the May indictment, two parties to the crime gave investigators – during a free talk – information that provoked the state to obtain a new indictment of Mesa in April, 2015, alleging the same charges plus charges of first degree burglary and conspiracy of first-degree murder. After Mesa's arraignment, the State dismissed the 2014 charges without prejudice.

Rule: Rule 15.1(i)(1), Ariz. R. Crim. P. – Disclosure by state – Additional disclosure in a capital case – Time after arraignment.

Issue: When the state dismisses a prosecution and obtains a new indictment, are the time limits for filing notice to seek the death penalty reset to the date of the new indictment?

Holding/Reasoning: Yes. Absent bad faith by the state or prejudice to the defendant, when the state complies with Rule 16.6 in dismissing a prosecution and obtaining a new indictment, the time limits for filing under Rule 15.1(i)(1) restart. The trial court's decision to deny the motion to strike the State's notice of intent to seek the death penalty was affirmed by the Supreme Court and the case is remanded back to the trial court for further proceedings.

***State v. Ramos*, 239 Ariz. 501, 372 P.3d 1025 (Ct. App. 2016).**

Facts: After a jury trial, Derek Ramos was convicted of attempted possession of a dangerous drug by fraud, forgery, and taking the identity of another. Ramos appealed and claimed that, among other issues, the trial courts preclusion of his father's testimony – as a sanction of untimely disclosure – was an abuse of discretion.

Rule: Rule 15.7(a), Ariz. R. Crim. P. – Sanctions – Failure to make disclosure.

Issue: Can the court impose preclusion as a sanction if a party fails to make disclosure required by this rule.

Holding/Reasoning: Yes. "When an untimely disclosure occurs, the opposing party may move for sanctions, in which case the trial court 'shall impose any sanction it finds appropriate.'" The considerations a court must take into account when making the decision for imposing a sanction for untimely disclosure is: "the vitality of the evidence to the proponent's case; the degree to which the evidence or the sanctionable conduct has been prejudicial to the opposing party; whether the sanctionable conduct was willful or motivated by bad faith; and whether a less stringent sanction would suffice."

Ramos argues his case using: *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984). The Arizona Court of Appeals held that in *Smith*, the untimely disclosure was not due to a lack of diligence and the State was not prejudiced by the untimely disclosure.

The Arizona Court of Appeals held that the trial court did not err in by precluding the witness's testimony as a sanction for the untimely disclosure.

State v. Martinson, 241 Ariz. 93, 384 P.3d 307 (Ct. App. 2016).

Facts: After Martinson was found in his home with his wrist cut and his dead child in the other room, killed from toxicity of a muscle relaxer, the State charged Martinson with first-degree felony murder and child abuse.

The trial court granted defendant's motion to prevent the State from presenting evidence and arguing that the defendant intentionally killed his child. Jurors convicted Martinson on both counts.

The State appealed an order dismissing the charges of first-degree felony murder and child abuse charges against Martinson with prejudice on the basis of prosecutorial misconduct.

Rule: 16.6(d) – Dismissal of prosecution – Effect of dismissal

Issue: Was the prosecutor's actions improper? If they were, what is the proper remedy at law?

State v. Martinson, 241 Ariz. 93, 384 P.3d 307 (Ct. App. 2016).
Cont.

Holding/Reasoning: While the State was entitled to pursue an intent to kill theory as a matter of substantive law, attorneys are ethically bound to abide by court rulings – even those with which they disagree. Therefore, the prosecutor's conduct was improper.

However, Martinson cannot establish the requisite prejudice arising from that conduct that would bar retrial on double jeopardy grounds. The court held that where there has been misconduct but no error, or the error is harmless, the proper remedy is generally not reversal but affirmance followed by appropriate sanctions against the offending actor.

Further, because the law permitted the State to prove the felony murder charge with evidence that Martinson intended to kill his child, to the extent such evidence and argument was presented at trial, Martinson suffered no cognizable prejudice.

The court vacates the order dismissing the 2004 indictment with prejudice and remands with instructions to grant the State's motion to dismiss that indictment without prejudice.

State v. Decker, 239 Ariz. 29, 365 P.3d 954 (Ct. App. 2016).

Facts: Decker was charged with first-degree murder and first-degree burglary after firing a firing three bullets into the front door of a residence, striking and killing the victim and killing him. Decker was convicted and later appealed on the grounds that the superior court erred in denying his Batson challenges to the State's peremptory strikes of prospective jurors.

Rule: Rule 18.4.c.100, Ariz. R. Crim. P. – Challenges – Peremptory challenges.

Issue: Did the superior court err by denying Decker's Batson challenge to the State's peremptory strike of Juror 1 and Juror 76?

Holding/Reasoning: No. "Batson challenges are assessed in three stages: (1) the party challenging the strikes must make a *prima facie* showing of discrimination; (2) the striking party must provide a race-neutral reason for the strike; and (3) if a race-neutral explanation is provided, the trial court must determine whether the challenger has carried its burden of proving purposeful racial discrimination." In the case at hand, Decker argues that the prosecutor's "lack-of-information" explanation for the strikes was pretextual because the prosecutor could have questioned Jurors 1 and 76 to elicit additional information, but chose not to do so.

Decker failed to show that the strikes represented purposeful racial discrimination. The court held that the prosecutor offered an additional relevant and facially race-neutral reason for each strike. The judge confirmed the prosecutor's observation of Juror 76 failing to follow the court's instructions and implicitly found credible the prosecutor's account of Juror 1's dozing and inattentiveness, and the court of appeals deferred to the superior court's first-hand observations and credibility determinations.

State v. Kolmann, 239 Ariz. 157, 367 P.3d 61 (2016).

Facts: Kolmann was found guilty on ten counts of exploitation of a minor and one count of conspiracy to commit sexual exploitation of a minor. During the jury deliberations one juror informed the trial court judge that she did not feel as if she was suited to make a judgment in this situation for personal reasons. Without objection from counsel, the judge excused her and replaced her with an alternate juror. The judge instructed the jury: “[e]ssentially, [the alternate juror] hasn’t had the benefit of the discussions with you of what has taken place already within the jury room. So to some extent you are going to have to start over again and involve her in discussions with regard to any individual and all of the counts, generally.”

Rule: Rule 18.5(h), Ariz. R. Crim. P. – Procedure for selecting jury – Selection of jury

Issue: Did the trial court err by not reading the jury instruction verbatim, per rule 18.5?

Reasoning/Holding: No. Although the court did not strictly follow Rule 18.5(h) by stating “to some extent,” it expressed the need to start deliberations anew by involving the alternate in discussing all of the counts, and we presume the original eleven jurors followed this instruction. Further, the court held that Kolmann did not show prejudice. The trial courts decision is affirmed and Kolmann’s conviction is upheld.

State v. Dalton, 241 Ariz. 182, 385 P.3d 412 (2016).

Facts: Dalton was reportedly seen in an alley keeping watch for a man, on a roof, by a witness, stealing a swap cooler. Following a 911 call Dalton, and the man seen stealing the swamp cooler, were seen walking together down the street. Dalton was subsequently convicted of second-degree burglary and criminal damage.

Rule: Rule 18.5h.040, Ariz. R. Crim. P. – Procedure for selecting jury

Issue: Does the lack of the courts direction to give a deliberate-anew instruction to the jury after a juror has left during deliberations constitute a structural error that automatically requires reversal?

Holding/Reasoning: No. The court held that because Dalton failed to object to the trial court’s failure to instruct the jury to begin deliberations anew, he must show fundamental error. While Dalton did indeed show error, he must “carry his burden” past a three part test which shows that the nature of the error: 1) goes to the foundation of [the] case, 2) takes away a right that is essential to his defense, and 3) is of such magnitude that he could not have received a fair trial.

The court held that Dalton failed – if nothing else – to show prejudice. Thus, the Arizona Supreme Court vacated the court of appeals decision and affirmed Dalton’s convictions.

State v. Pedroza-Perez, 240 Ariz. 114, 377 P.3d 311 (2016).

Facts: Pedroza-Perez was led by two “coyote” smugglers through the desert from Mexico To Arizona. After spotting several smugglers, Border Patrol agents and sheriff’s deputies found Pedroza-Perez with several bales of marijuana. The trial court ruled that Pedroza would not be able to include his defense of duress in his opening statements unless he agreed to testify in his trial to this defense.

Rule: Rule 19.1(a)(3), Ariz. R. Crim. P. – Conduct of trial – Order of proceedings – Opening statements

Issue: Was the preclusion of Pedroza-Perez’s defense from the defense counsel’s opening statement an error that harmed Pedroza-Perez’s defense?

Holding/Reasoning: The Supreme Court of Arizona held that the trial court’ restriction on Perdoza-Perez’s opening statement did not deprive him of the basic protections of a criminal trial or affect its basic framework. The court put emphasis on the fact that he was not barred from using the defense of duress, but the use of that defense was contingent upon his testimony to the facts of the defense.

The court of appeals decision was vacated and the case was remanded to allow the court to consider if the trial court’s action in limiting Pedroza-Perez’s opening statement was harmless beyond a reasonable doubt.

***State v. Jean*, 239 Ariz. 495, 372 P.3d 1019 (Ct. App. 2016). [Rev. Pending]**

Facts: DPS officers placed a tracking device on a commercial truck because they suspected the truck was involved in criminal activity. No warrant was obtained prior to placing the GPS device on the truck. DPS stopped the truck and found Jean sleeping in the truck. Jean claimed he was simply a driver-in-training. A search of the truck revealed 2,140 pounds of marijuana.

Rule: Rule 19.1(mmt), Ariz. R. Crim. P. – Conduct of trial – Motion for mistrial

Issue: Do repeated ambiguous references to the defendant, outside the scope of the case at hand, by witness testimony, give reason for a mistrial?

Holding/Reasoning: No. The testimony at issue did not necessarily refer to other trips with Jean. The owner of the truck in controversy had testified to his vast involvement in drug trafficking and affiliations with several individuals while drug trafficking. Because of this, he could have been referring to any of those individuals when saying “we.”

The court held that the trial court did not abuse its discretion when it denied Jean’s motion for a mistrial.

***State v. Kolmann*, 239 Ariz. 157, 367 P.3d 61 (2016)**

Facts: Kolmann was found guilty on ten counts of exploitation of a minor and one count of conspiracy to commit sexual exploitation of a minor. During the jury deliberations one juror informed the trial court judge that, for personal reasons, she did not feel as if she was suited to make a judgment in this situation. Without objection from counsel, the judge excused her and replaced her with an alternate juror. These events took place in the absence of the defendant’s presence due to Kolmann’s attorney waiving his presence.

Rule: Rule 19.2, Ariz. R. Crim. P. – Presence of defendant at trial

Issue: May the defendant – or the defendant’s attorney – waive the defendant’s presence at trial?

Holding/Reasoning: Yes. While defendants have the right, rooted in the Sixth Amendment, to be present at every stage of trial, that right is not absolute and may be waived by the defendant or their attorney. The court held that even if Kolmann was able to show that his attorney fell below professional standards in waiving his presence, he has failed to show how his absence has prejudiced him in the proceedings.

***State v. Goudeau*, 239 Ariz. 421, 372 P.3d 945 (2016).**

Facts: The facts of this case are intricate and were explained in some detail in earlier slides. This seminal facts on this topic are that the prosecutor referred to Goudeau as “a wolf in sheep’s clothing” in closing arguments, and that the court had previously held that those statements were improper yet not necessarily harmful in to the trial.

Rule: Rule 24.1 (c)(2), Ariz. R. Crim. P. Motion for new trial – Prosecutorial misconduct

Issue: Is a defendant entitled to a new trial based on the fact that a prosecutor’s conduct was improper alone?

Holding/Reasoning: No. The court held that although the prosecutor made some improper remarks during the opening statement, they did not amount to persistent and persuasive misconduct that deprived defendant of a fair trial.

***State v. Olague*, 240 Ariz. 475, 381 P.3d 269 (Ct. App. 2016).**

Facts: Olague was convicted of first-degree murder and armed robbery. Facts of the case given in the opinion are minimal. One issue he raised on appeal is juror misconduct. This issue was raised based upon the contention that a juror had grounded her vote upon the influence of being bullied and feared retaliation after voting other than guilty.

Rule: Rule 24.1(c)(3), Ariz. R. Crim. P. – Motion for new trial – Juror misconduct

Issue: Does pressure from other jurors – to another juror – give rise to grounds to grant a motion for a new trial?

Holding/Reasoning: No. The court cited precedent from *State v. Hutton*, 143 Ariz. 386, 391, 694 P.2d 216 221 (1985) stating that: “[p]ressure from other jurors, generally, will not serve as the basis for a mistrial.” While the court may grant a motion for mistrial if a juror receives a bribe or pledged vote, the court held that testimony from a juror, or an affidavit from a juror alleging such, does not constitute grounds for granting a new trial.

The court of appeals affirmed the convictions.

***State v. Pedroza-Perez*, 240 Ariz. 114, 377 P.3d 311 (2016).**

Facts: Pedroza-Perez was led by two “coyote” smugglers through the desert from Mexico to Arizona. After spotting several smugglers, Border Patrol agents and sheriff’s deputies found Pedroza-Perez with several bales of marijuana. The trial court ruled that Pedroza would not be able to include his defense of duress in his opening statements unless he agreed to testify in his trial to this defense.

Rule: Rule 31.13(c), Ariz. R. Crim. P. – Appellate Briefs – Contents – Structural Error.

Issue: Is there structural error when a defendant’s opening statement is restricted from mentioning a defense in which he has not testified to?

Holding/Reasoning: No. While in this case the court held that there was error in the restriction, the court did not find that the error was structural. A structural error would mandate a reversal regardless of prejudice because prejudice is presumed in the instance of structural error. The court held that in this case, the opening statement restrictions did not deprive the defendant of the basic protections of a criminal trial or affect its basic framework.

Structural error is only found when it deprives the defendant of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and error that affected the entire conduct of the trial from beginning to end.

The issue was remanded for the trial court to determine whether the error was harmless although not structural.

***State v. Amaral*, 239 Ariz. 217, 368 P.3d 925 (2016).**

Facts: Amaral pled guilty to two counts of first-degree murder and one count of attempted armed robbery. He was sentenced to a term of 57.5 years and eligible for parole thereafter. It was determined by a psychologist that Greg Dickens, Amaral’s counselor at a placement center, had been sexually abusing him. Amaral had claimed that he had committed the crimes at the direction of Dickens.

Rule: Rule 13.5(c), Ariz. R. Crim. P. – Scope of remedy – Newly-discovered evidence.

Issue: Can post-conviction relief be granted based on newly discovered evidence?

Holding/Reasoning: Yes. However, one of the requirements for a claim of newly discovered evidence is that the evidence must appear, on its face, to have existed at the time of trial but be discovered after trial. The court held that because the scientific evidence of advancements in juvenile psychology and neurology did not exist at the time of his sentencing, post-conviction relief was not appropriate.

The evidence must be colorable, and the court used the *Bilke* requirements to test this matter. The first requirement is that the evidence must appear, on its face, at the time of trial but be discovered after trial.

The court held that Amaral did not present a colorable claim and vacated the decision of the court of appeals and affirmed the trial court’s decision dismissing the petition for post-conviction relief.
